In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No.

MARIO JOSEPH PACMAN,	*Petitioner,*
vs.	
UNITED STATES OF AMERICA,	*Respondent.*

BRIEF IN SUPPORT OF PETITION.

OPINIONS BELOW.

The opinion of the Court below has not been officially reported, but it appears in the record at pages 153-158. The District Court opinion (?) appears at R. 124-132.

JURISDICTION.

A statement as to jurisdiction is contained in the foregoing Petition, and the same is hereby adopted

and made a part of this brief. (See R. 9, 133-149; Grounds for Appeal; R. 2-3, Indictment.)

A concise statement of the case appears in the preceding petition, which is hereby adopted and made a part of this brief.

ARGUMENT.

Receipt of an induction order which only becomes effective at a specific time and place ten days later is not probable cause for a defamatory arrest and indictment. Much may have occurred during this ten-day interval. The refusal by the Local Board to give any consideration to what had occurred during this ten-day interval, and the later denial of this by the District Court is deemed reversible error because the supposed crime is charged to have occurred on September 14th, instead of ten days before, September 4th, which is erroneously considered date of presumed crime.

POINT I.

AN INDICTMENT PROMPTED BY ANY LOCAL BOARD WITHOUT AUTHORITY BEFORE SAID LOCAL BOARD EXECUTED ITS KNOWN ADMINISTRATIVE PROCEDURE IS AN INDICTMENT WITHOUT DUE PROCESS AND PROBABLE CAUSE PROHIBITED BY ARTICLE III OF THE UNITED STATES CONSTITUTION AND BY AMENDMENTS IV, V, AND VIII OF THE CONSTITUTION.

ONLY THE RECEIPT OF AN INDUCTION ORDER WHICH LATER BECOMES EFFECTIVE AT A GIVEN TIME AND PLACE TEN DAYS THEREAFTER SHOULD ALSO BE DEEMED INSUFFICIENT CAUSE FOR AN INDICTMENT, WHERE THERE HAS INTERVENED AUTHORITATIVE INFORMATION THE SAID ORDER HAD BECOME TEMPORARILY INEFFECTIVE.

The perusal of the then effective Selective Service Regulation reads as follows:

> "628.1. Who May Appeal to the President From Any Determination of a Board of Appeal. When either the State Director of Selective Service or the Director of Selective Service deems it to be in the national interest or necessary to avoid an injustice, he may appeal to the President from any determination of a board of appeal. He may take such an appeal at any time." Ref.: 434759-42-14. (Also mentioned in Rep. Tr. p. 88.)

Considering Exhibits "C", "J", "A", and "K", there is good reason to believe that specific induction order referred to had been temporarily stayed by the State Selective Service Director before it became effective. That Registrant* relied upon said assurance and act of the State Selective Service Director and dismissed the matter from his mind until he would hear from said State Director. There was no conver-

*Registrant and Defendant (when quoting) refers to petitioner.

sation between the Local Board and the Registrant from the day preceding the date the induction order was mailed to the day following the specific date mentioned in the induction order for appearance. However, the day following the day he would have and should have otherwise reported, he received a suspected delinquency notice. Registrant immediately telephoned the Draft Board to find out when it would be most convenient to the Draft Board for him to come there, but the Draft Board told Registrant to ignore notice as it was only a procedural form and the case was out of its hands.

For redress from this denial, Registrant sent a letter to the Governor, the following day, to explain this delinquency. Registrant wrote the prosecutor requesting information and advice by telephone or any other convenient means, and received no reply. Registrant could do nothing more until further instructions were received; no further instructions were received.

During trial the Registrant was denied the opportunity to prove he answered suspected delinquency notice the day following the date of induction, but the following testimony of the Chief Draft Board Clerk is quoted from the record to support the contention that the administrative redress was arbitrarily refused:

> "Q. I show you what seems to be a copy of the rules and regulations, and is a Government publication, published by the Government for selective service system. Does your office have a set similar to that?

A. Yes, sir. May I get my copy and my glasses, please?

Q. All right. Let's do that, please.

Will you turn to Regulation 642.3. It is under 'Delinquency'.

A. Yes, sir.

Q. Does your copy contain the following: 'Section 642.3. Disposition of Delinquencies. If a suspected delinquent has been located as a result of the Local Board's efforts under Section 642.2 or a suspected delinquent has reported voluntarily to a Local Board, the Local Board shall carefully investigate the delinquency. If the Board finds that the suspected delinquent is innocent of any wrongful intent, the Local Board shall proceed to consider him just as if he were never suspected of being a delinquent.'?

Does your copy contain that statement?

A. Yes.

Q. Were you familiar with that statement?

A. Yes."

(Rep. Tr. p. 165, lines 12-26; p. 166, lines 1-18.)

"By Prosecution:

Q. Did the defendant communicate with the Board in any way after that notice of suspected delinquency was mailed to him?

A. He phoned one day and asked me—he wanted to come to the Board and explain the situation. I told him it was out of our hands, it was in the hands of F.B.I., we had nothing more to do with it and he was to contact them.

Q. What date was that, approximately?

A. September 19th, I believe; it was the date the notice says to contact.

Prosecution. That is all."

(Rep. Tr. p. 47, lines 18-26; p. 48, lines 1-4.)

Registrant is certain the accurate date is September 15th, and can yet support it to have been the 15th with a retyped copy of Exhibit "K" which was mailed to the Governor on September 16th, as registered article No. 359155; this exhibit contains about four thousand words. It refers to and was sent because of this denial of the Draft Board Clerk. It could not have been sent registered mail on September 16th if this telephone denial had occurred on the 19th; and even if the 19th were accepted as the correct date, it would still be within the five days as required by Selective Service Regulation 642.2. Furthermore, in the file of the Clerk of the District Court is a "D. D. S. Form 279", dated and sent by this Draft Board Clerk on September 14th to the United States District Attorney. This form is a request for criminal prosecution issued and sent the same day the suspected delinquency notice was sent, the very day induction order, believed stayed, had requested Registrant's appearance, and this was prohibited by the following Selective Service Regulation:

"Part 642—Delinquency: 1-642.

642.2—Investigation of Delinquency. (a) After mailing the Notice of Delinquency (Form 281), the local board shall wait 5 days before taking further action * * *"

All the preceding non-compliance with administrative procedure by a local Draft Board made it impossible for Registrant to do anything while he was not a delinquent according to the Selective Service definition, which read:

"Part 601—Definitions: 1-601.

601.5—Delinquent. A 'delinquent' is (1) any man required under the selective service law and directions given pursuant thereto to present himself for and submit to registration on a certain day fixed by the President who fails to so present himself for and submit to registration on that day and has no valid reason for having failed to perform that duty * * *"

Ref.: 434759-42-1.

The preceding denial of administrative procedure was followed by a humiliating arrest in a public office. Bail was acceptable for only $1000, if furnished by a bondsman. The Marshal advised Registrant to take it if he wanted freedom, but Registrant declined to purchase it because this cash bond would be furnished by friends. Within ninety minutes this bail was refused from a prominent bank. Without probable cause, Registrant was confined for three days at $7500 bail. Untrue and injurious draft evader articles had appeared in the press during this confinement.

Friends called upon the United States Commissioner and entreated him to reduce the bail because Registrant would hardly flee since he had awaited some instruction for over a month, without bail. Upon request they told the Commissioner they had a total

of $2500. During the arraignment which followed, the Registrant plead "not guilty" to any wilful violation. The Chief Draft Board Clerk was placed under oath and interrogated as to whether or not Registrant had made any remark or statement to her which showed disregard or contempt for any governmental department. The Clerk denied knowledge of any such remark or statement. Registrant was then told that if he would sign up then and there the Government would not prosecute the charge. During the three-day confinement Registrant had learned that this meant reconfinement until induction, and then delivery to the induction center was in irons. There were many registrants in confinement who had been awaiting induction over thirty days. Registrant deemed the administrative proceedings to this point were arbitrary and prohibited by the constitution; that Registrant had been motivated by the sincerest convictions and at no time had any intent wilfully to disobey any induction order, and believed himself innocent of the crime charged, or any crime; and for redress requested that the charges be dismissed before induction; this was refused. Bail was set at $3500; that sum necessitated that it be purchased from the bondsman present.

After release on bail and before Indictment No. 15,690 was issued on October 28th, the Registrant, a minister, and an attorney, each at different intervals requested that the charges be removed first so that Registrant could obey an induction order; but this was refused. The Registrant had contended that ac-

cepting the offer of non-prosecution, in consideration of joining, after all that had happened, was, in effect, pleading guilty to avoid sentence, which he could not with good conscience do when he believed himself innocent of any criminal intent.

United States Constitutional Amendments, Art. I through Art. XIV, especially:

> Article IV. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."
>
> Article VIII. "Excessive bail shall not be required, * * * nor cruel and unusual punishments inflicted."

Article I, Sec. 9 of the U. S. Constitution, " No bill of attainder or Ex post facto law shall be passed", is cited as Indictment No. 15,690, was filed on October 28, 1942, and trial date was postponed several times. Petitioner now finds he was reindicted, without his knowledge, with Indictment No. 15,789 on January 13, 1943; probably because of new Administrative and Judicial interpretation to be applied.

POINT II.

THERE WAS REVERSIBLE ERROR IN NOT PERMITTING THE DEFENSE AS TO CRIMINAL INTENT. THE TRUE INTENT WAS TO RECEIVE A PROPER CLASSIFICATION INSTEAD OF EVADING INDUCTION. DUE PROCESS AND PROBABLE CAUSE ASSURED BY THE UNITED STATES CONSTITUTION AND ITS AMENDMENTS WERE WANTING.

The effect of exhibits from petitioner's point of view should have been permitted when the detrimental effect of the same exhibits was permitted the prosecution. Petitioner was denied the opportunity to explain the vocally emphasized, "I doubt my ability to withstand physical strain", when read from Selective Service Questionnaire of 1940 (Exhibit "2"), as recorded on reporter's transcript, page 11. If permitted, petitioner could have and still can produce a receipted bill from the Queen of Angels Hospital, Los Angeles, California, which would have proved that petitioner had a surgical operation on April 5, 1941. That without this surgery, petitioner would not have passed the military physical examination was common knowledge; that this ailment had existed for many years; that there existed no emergency that the surgery be performed then; and that the majority of such patients carry this condition throughout life. The fact that petitioner did not take advantage of this physical rejection ailment would have explained his sincerity in making this statement in this previous 1940 questionnaire.

The Conscientious Objector's Form (Exhibit "3") shows an earnest desire to serve well in many military units, besides the limited portion used and offered by

the prosecution and admitted by the Court to the disadvantage of petitioner.

A letter to the local board (Exhibit "5"; R. 34) initiated by petitioner was an earnest desire to serve well in many military assignments, when service in Alaska seemed as dangerous as service anywhere. It was deemed unfair to use this letter only to show that its maker had failed to do what he promised, when an assignment within its premise had not been granted, as 1-A-O assignments then included destructive service on the land of others, and was *not limited* to the *safe easy duties* explained by the District Court, as follows:

> "A Juror. I don't know if it is material, but would it be advisable for the jury to learn what 1-A-O means? I mean what services and what they have to do under that 1-A-O.
>
> The Court. They are under the direction of the military authorities of the United States, but they will never have to carry a gun or shoot a gun or be on a battlefield, but they are under the direction. There are a great many things the Army must do. For instance, Quartermaster. They do not carry guns, they do not shoot, they are not on the firing line. They see that the food gets up to the Army. They may be stationed at one of the ports to assist in the loading of vessels. There are thousands of things that men under this department do, but they are under the direction of the Army. The only difference is a difference between a combatant and a non-combatant, and this defendant was placed in this category, the non-combatant category."
>
> (Rep. Tr. p. 178, lines 10-25.)

Again the District Court states:

> "The Court. I am going to assume the law is carried out as written by Congress and signed by the President, and I am going to assume that these different classifications will be carried out, and when it says 'non-combatant', it means exactly what it says, that he will never have to put himself in danger of a gun or never have to carry a gun himself; he will be put somewhere in non-combatant service. I cannot assume anything else. Therefore, I do not believe the question that has been asked is material. I will sustain the objection and allow the defendant an exception. Proceed."
>
> (Rep. Tr. p. 188, lines 19-26; p. 189, lines 1-2.)

It is contended that the above statements were only the personal unauthoritative interpretation of the classification 1-A-O, and would mislead and prejudice a jury toward conscientious objectors, and particularly prejudiced it against one who preferred not to serve within said explained "safe berth" classification.

Although the 1-A-O classification was subsequently, by authoritative act of the Secretary of War, limited to medical service anywhere, it was not then and is not now the "safe berth" pictured by the Court. In areas of conflict, the mortality rate is reported and recognized to be as great, if not greater, than that of combatant soldiers.

> *"Whatsoever ye would that men should do te you, do ye even so to them."*

Also, the foregoing authorities.

POINT III.

A MISCARRIAGE OF JUSTICE PROBABLY FOLLOWS WHEN THE CIRCUIT COURT HAS PRESENTED TO IT UNTRUE FACTS WITH WHICH TO FIND A TRUE DECISION; REPRODUCTIONS KEPT UNKNOWN TO PETITIONER.

Unless it may be done without harm, and it is necessary so as to reaffirm the petitioner's belief that "Law is justice and equity if possible", he does not choose and honestly doubts his ability to elect those responsible for the many detrimental errors appearing in the record. Attention is hereby respectfully called to only some of them:

Error A.

The petitioner is recorded and was considered as being insincere. (R. p. 58.) Attention is directed to the most accurate available recorded source of this information.

> "By the Defense. Q. When Mr. Pacman had this personal interview with the Board, did the Board form the opinion he was insincere in his views?
>
> A. Yes, *as a non-combatant.*
>
> Q. With respect to this letter which you construed as an application for 4-E, did he at any time meet personally with the Board in connection with that application?
>
> A. No, sir.
>
> Q. Your action in denying his application was then without his appearing personally before the Board?
>
> A. That is right.
>
> Defense. That is all.

Prosecution. That is all (witness excused)." (Emphasis supplied.)

(Rep. Tr. p. 63, lines 11-25.)

From the foregoing testimony and what precedes it, it is clear:

(1) That the interview was the only interview had;

(2) The fact that the Board had then granted petitioner a non-combatant 1-A-O classification for conscientious objectors;

(3) That it is common knowledge that any Board on any public assignment should endeavor to act reasonably to the best of its ability;

(4) That it is not only wrong but a crime for a draft board to grant a non-combatant conscientious objector's classification to a registrant if at the time the Board grants it the Board deems the registrant insincere in the non-combatant conscientious objector classification it grants;

(5) That this Board chairman has emphatically affirmed doing what is wrong, and thereby violated U. S. Code Appendix Title 50, Section 311, as only two board members were present, and he was one of the two.

The defense counsel claims he did not use the word "insincere" in the above question, but did use the word *"sincere"*. Common sense dictates that from the answer of the Board chairman to the question as recorded, to-wit: "Yes, as a *non-combatant"*, that the

word in the question was *sincere* instead of the recorded *insincere*. Is it reasonable to suppose that any Local Board chairman or representative would freely admit that there had been a criminal dereliction of duty by granting a classification where they believed the registrant insincere as to the classification granted? The appendage *"as a non-combatant"* to this affirmative answer is worthy of consideration in determining if the word used, and the word answered to, was "sincere" instead of the recorded "insincere".

This should be deemed reversible error as it resulted in considering the appeal of an *in*sincere person to the great detriment of a sincere person.

Error B.

Prosecuting "Witness testified further that on September 4 defendant came to the office of the Board and asked to see his file and go through it, which she permitted, and inquired as to what the necessary procedure was. * * * (R. p. 52.)

Petitioner herein offers to prove beyond reasonable doubt that the above reproduction into the transcript of record was distorted so as to establish the only September day that petitioner appeared at the office of the Board detrimentally to have been the day *following* instead of the day *preceding* date on which induction order was mailed.

Petitioner's recorded testimony states that he appeared at the office of the Board only on September 2nd, and before sending said Board the telegram; the

following from the exhibits and the prosecuting witness will support petitioner's recorded testimony:

(1) (a) Several hours after going through his file at the Local Board office, the petitioner sent the Local Board a telegram (exhibit "C", dated 9/2/42). The very contents of this telegram will later show it was the result or effect which was caused by going through the file at the Local Board; it also mentions a Presidential Review request being prepared.

(b) The Presidential Review request (Exhibit "K", dated 9/4/42) is what was referred to as being prepared by the above mentioned telegram on 9/2/42. Its contents proves the file at the Local Board Office had to be gone through before it could be prepared as it is a refutation of Exhibit "B" which could only have been examined by going through the file at the Local Board.

(c) This Presidential Review request (Exhibit "K") is six and one-half pages in length. It contains about four thousand words prepared with meticulous care.

(d) This Presidential Review request (Exhibit "K" had been sent by registered mail to the State Selective Service Director, to the National Selective Service Director, and to the National Service Board for Religious Objectors on 9/5/42. Registered Article No's. 357226, 357227, and 357225 or 357228.

It is contended: prosecuting witness testified that petitioner came to Local Board office and went through his file on the 2nd; above (a), (b), (c), and (d) could not exist if it had been on the 4th. It is impossible to review a file, and after noting its contents to send a telegram which shows an effect two days before its cause; a cause should precede the effect or result.

(2) The petitioner appeared *about* the fourth to review file was stated by prosecuting witness with, "Yes, he came in to the Board *about* September 4th and asked to see his file and to go through it, which I permitted the defendant to do." (Rep. Tr. p. 45, lines 6-8.)

The testimony throughout trial shows there was no conversation between the Local Board and the petitioner between the 2nd and the 15th day of September, and is supported with the following between prosecuting counsel and prosecuting witness:

> "Q. Mrs. Sniff, you testified this morning that you had a personal conversation with Mr. Pacman *on* September 4, 1942, at the office of the Local Draft Board, is that correct?
>
> A. Now, I am not sure about the date, whether it was the 2nd or the 4th; I did have a conversation with him.
>
> Q. That is the only conversation that you had since sending out the order to report for induction?
>
> A. No, I had another one over the telephone, that was after he had his delinquent notice."
>
> (Rep. Tr. p. 249, lines 3-11.)

Emphasis to *"on"* being used instead of testified *"about"* was furnished only to respectfully call attention to some of prosecuting counsel's technique; this was reproduced as *"on"* in R. p. 52.

That prosecuting counsel acknowledged there was no conversation between the 2nd and the 15th is supported by the following from said counsel, "Now Mr. Pacman, on September 2, 1942, you had, you testified a conversation with Mrs. Sniff, the clerk of the Board * * *?" (Rep. Tr. p. 205, lines 14-16.)

It is contended, there was no conversation between the Local Board and petitioner between the 2nd and the 15th. Even if all the exhibits, as well as petitioner's testimony, were denied there is no testimony there was a conversation between the 2nd and the 15th.

Error C.

On R. 91 appears, "that he made inquiry at the induction center at 6th and Main Sts., about going into the Medical Corps in some assignment where he wouldn't have to swear to kill * * *" This is contended inaccurate, and supported with its recorded source, as follows:

> "Q. On what other occasion did you try to get into the military service?
>
> A. At another date, I can't give it. I asked if a person could go into the medical corps." (*period*)
>
> "Q. Approximately when was it?
>
> A. Say, two months.

Q. To whom did you say that?
A. I went up to the—Sixth and Main Street."
(Rep. Tr. p. 227, lines 9-16.)

The aforegoing does not honestly state that oath assurance was wished nor asked in assignments from the Medical Corps. However, after any Medical Corps assignment was declared impossible before an unqualified military oath was taken, petitioner asked if he could serve in other Military Departments with only a qualified oath, or without oath, and this was not permitted then; no assurance of a Medical Corps assignment was announced until after conviction of petitioner.

Error D.

On R. 127 appears:

> "Some days later, about September 19th, which was five days after his induction order expired, the defendant appeared at the office of the local board and informed the Clerk he did not report for induction and did not intend to appear." (?)

There was no such testimony, and the Reporter's Transcript shows: only one appearance to review the file which was permitted on the 2nd or 4th, and only one telephone conversation within the time in answer to suspected delinquency notice *about* the 19th is the testimony of the prosecuting witness. Only one appearance *on* the 2nd before sending Exhibit "C", and only one telephone conversation immediately upon receipt of suspected delinquency notice is the recorded

testimony of petitioner. The review of the file at the Local Board caused Exhibit "C" to be sent, and the file could not have been reviewed on the 4th when Exhibit "C" evidently was sent on the 2nd. Prosecution and defense witnesses testified the suspected delinquency notice was answered by telephone. Prosecution witness stated the phone message about the 19th was within the five days and that the appearance was denied. The defense witness stated immediately and meant the 15th. He was denied proof that the correct date was the 15th but can still point to the fact that this denial of appearance caused the making of a fourth complex Exhibit "K" to be sent to the Governor to explain the suspected delinquency; it was postmarked, registered article 359155, on September 16th, and refers to telephone denial to appear at Local Board. It is unreasonable to accept "about the 19th" when what was caused on the 19th was actually produced or effected on the 16th, this would be concluding that an act has been completed three days before the same act was begun.

Error E.

"*And if I can recollect,* he said, 'The hell with the F.B.I.'" appearing on page 45 of Reporter's Transcript, lines 22-23, is reproduced with such detrimental omission as, "Said 'the hell with the F.B.I.'"; on Record, page 52. Some of this Draft Board Clerk's statements on this page could have been proven untrue but this proof was denied petitioner, even though, "And if I can recollect, he said, 'the hell with the F.B.I.'" could have been disproved with five wit-

nesses, including a minister, all at the trial who had been at the United States Commissioner's Court three months earlier when this Draft Board Clerk, under oath, was interrogated by the prosecutor as to if petitioner had made any unworthy or defamatory remark. To this interrogation, this Draft Board Clerk then replied that petitioner made no such remarks and acted like a gentleman. It had only been about a month since she saw the petitioner then, but after over four months had elapsed since seeing the petitioner she testifies, "And if I can recollect, he said 'The hell with the F.B.I.'" without being asked. (?) This statement is contended untrue.

Error F.

On page 102 of the Record appears:

> "* * * that he relied upon the paragraph in said letter in connection with his contact with the board."

This statement as reproduced is too ambiguous and detrimental; what the petitioner relied upon is stated in his testimony which reads:

> "This letter was written after I had received the last letter dated the 22nd. It stated they were sending my reasons over to the Draft Board for their consideration, and I thought possibly now they would give it consideration, so I asked them to give me the opportunity to explain the things that were definitely false or to advise me because I had stated previously I would cooperate, if I would only get some justice; that was all I wanted, was righteous justice."
>
> (Rep. Tr. p. 269, lines 9-17.)

Error G.

On page 128 of the Record, it states that the evidence admitted, upon insistence of counsel, was *inadmissible because it referred to what occurred after default.* This erroneous conception should be reconsidered as the facts on record prove otherwise. Every exhibit admitted of any value was degraded and devalued to the jury by the argument during its introduction, *yet five of the six different exhibits admitted actually refer to acts and intent before default* date which is September 14th. The dates appearing on them will support this. Furthermore, the refusal into evidence of other exhibits which were necessary component parts of admitted exhibits made some admitted exhibits of little or no value. The prosecution introduced thirteen exhibits and thirteen were admitted. The defense introduced fifteen exhibits from the same Selective Service File and only six sporadic exhibits were admitted. It is contended that when the prosecution may use any great part of a correspondence file the defense also may use other pertinent parts of this identical correspondence file. There are other very detrimental errors in this requested summary, and this Honorable Court is entreated, in the name of justice, to make its own findings or to permit a new trial before accepting this summary.

> *"Thou shalt not bear false winess against thy neighbor."*

Also, the aforegoing authorities.

POINT IV.

THE DISTRICT COURT ERRED IN NOT ADMITTING TESTIMONY WHICH WAS MATERIAL AS TO CRIMINAL INTENT, AND DOCUMENTARY EXHIBITS IN SUPPORT OF CONTENTION THAT THERE WAS NO INTENT OTHER THAN TO SERVE WELL AND BEST IN PROPER INDUCTION CLASSIFICATION.

Upon receipt of Induction Order accompanied with a letter stating, "* * * a stay of induction can only be ordered by the State or National Director of Selective Service * * *", the petitioner sent the following telegram on September 4th:

"Major K. A. Leitch,
Selective Service Headquarters
Sacramento, Calif.

Sir:
September first I received appeal classification mailed day before. Am sending conclusive proof that Presidential Review is justly necessary tomorrow, but just received induction order mailed yesterday from Local Board 228 at 5106 Fountain Avenue, Los Angeles. I have no criminal record yet, and will appreciate a stay of induction pending review which I shall respect. Please inform if I should see Prosecutor. Answer by Western Union Collect.

Mario J. Pacman,
1116 South Flower."

(Defendant's Exhibit "J".)

Petitioner received the following telegram the following day:

"SVO Sep 5 PM 1 03
D Sep 5 PM 1 34
1942 Sep 5 PM 12 44
BZA97 15/14 Collect–Sacramento Calif 5 1157A
MARIO J. PACMAN—
(penciled in, following name): 62+06
1116 So Flower
Answer Sept 4th Losa
(Stamped in red ink): C 266.
Reurtel. Upon Receipt your Correspondence. Will give Matter Consideration and Determine Appropriate Action.
K. H. Leitch State Director of Selective Service.
Pacman.
BQ97 Mario J. Pacman
(Endorsed): Filed 1/27/1943."
(Defendant's Exhibit "A".)

For the purpose of aiding the jury in determining the vital matter of the intent of petitioner as to wilful violation of Induction Order, and without which the jury could not determine the true intent of the petitioner, the defense counsel asked petitioner to explain the words "and will appreciate a stay of induction pending review which I shall respect", as follows:

"Q. I call your attention to Defendant's Exhibit J, and ask you if you have any explanation to make as to your meaning or your intention in the use of the following phrase: 'and will appreciate a stay of induction pending review which I shall respect.'

Prosecution: Your Honor, I object to that.

The Court: Objection sustained. The jury can read the language and they can interpret it, it is not proper for a witness to put his own construction upon the words. It was the construction that was placed on it by the party that received it. If he meant something entirely different, that is for the jury, then for argument also to the jury. You can interpret it whatever way you think it should be interpreted."

(Rep. Tr. p. 269, lines 21-26; p. 270, lines 1-8.)

In the aforegoing, the petitioner was denied vital and material intent testimony with the declaration that the maker's or sender's construction is improper. Yet, the petitioner was also denied the recipient's or receiver's construction of Exhibit "A" on page 40 herein, in the following:

"Q. Now, you have admitted you did not report on the 14th of September. What reason, if any, did you have for not reporting on the 14th of September?

The Court: Has he not given that, counsel?

Defense: I don't think so, your Honor. It may be intimated. No, I haven't asked that direct question.

The Court: All right. You are entitled to ask that question to show intent.

The Witness: I didn't report because I definitely felt that that particular induction order was being reviewed, or my classification was being reviewed and that induction order was not in effect then. I felt that, 1, the wire the Court won't permit, and the other is the wire from Colonel Leitch. I wouldn't have refused to obey this

induction order. It didn't tell me I would have to kill. I still had an alternative if these people would not give me justice or consideration, I could go there.

Prosecution: Your Honor, I move to strike that out.

The Court: All that may be stricken out. Listen to the question of your counsel."

(Rep. Tr. p. 189, lines 21-26; p. 190, lines 1-14.)

The aforegoing should be deemed reversible error as it denied any material defense as to wilful intent. The denial of the maker's and sender's construction of Exhibit "J", and the further denial of the recipient's construction of Exhibit "A", made these exhibits valueless. These exhibits are reproduced on pages 39 to 40 herein, and they should support the petitioner's contention that he did not wilfully disobey an effective induction order; both exhibits are component parts of one idea.

There was error in excluding Exhibit "O" and Exhibit "N" because they show why any peace loving person without any reason to doubt the rightful acts of the State Selective Service Director would not initiate calling upon a subordinate of the State Selective Service Director only to request her to verify or corroborate the promised rightful act of her superior. These two exhibits had, in effect, informed the petitioner that said induction order had been prompted without authority.

Although it is admitted these two exhibits were not from an official Selective Service office, there is no

doubt that the source of the information was from the most dependable conscientious objector's information board in the United States; it acted as a liaison board between The Selective Service Administration Office and conscientious objectors. Being within its cause, the petitioner relied upon its authority until a greater authority should contest it. It was not contested until after date of presumed default; and it was testified that an appearance, an explanation, or advice was then denied to petitioner by the Chief Draft Board Clerk. Defendant's Exhibit "O" was sent September 4th:

"National Service Board for Religious Objectors
1751 N Street, N. W.
Washington, D. C.

Sir:

September first I received appeal classification mailed day before. Am sending conclusive proof that Presidential Review is justly necessary tomorrow, but just received induction order mailed yesterday from Local Board 228 at 5106 Fountain Avenue, Los Angeles. I have no criminal record yet, and will appreciate a stay of induction pending review which I shall respect. Please inform if I should see Prosecutor. Answer by Western Union Collect.

Mario J. Pacman,
1116 South Flower."

(Defendant's Exhibit "O".)

This telegram was identical with the telegram (Exhibit "J") sent to State Selective Service Director.

Defendant's Exhibit "N" was received by petitioner on September 5, 1942, and read:

"Mario J. Paeman
1116 So. Flower
Los Angeles, Calif.

Advise Induction Order should not have been issued until 10 days after classification.

Nat'l Service Bd. for Religious Obj."

There was reversible error in admitting the unreliable and incompetent report of the Department of Justice (Exhibit "B") and in not admitting petitioner's refutation thereto (Exhibit "K"). The sole reason for later denying the 4-E classification was based solely upon this report. Petitioner contended that he had been denied due process of law by the hearing officer, because he was called before a representative of the Department of Justice and certain facts were not disclosed to him. Other facts were partially disclosed to him in such a manner that petitioner had no way of refuting them at the time, or even understanding them at the time, as he would have been able to do had the facts been fully and fairly disclosed. That petitioner had also received a form from the Department of Justice before the interview, in which he was informed he could request detrimental information from them; that by registered letter he made a request for such information, which was refused. After the denial of the 4-E classification which had been advised but denied by the Local Board, which denial was based solely upon said report, according to testimony of Appeal Board

representative, petitioner at his first opportunity, examined said report, at which time he discovered and learned that the report relied upon contained statements made by persons who had had no personal knowledge of petitioner during his adulthood, and in fact had not even seen petitioner for approximately eighteen years, and by persons having personal and other motives disentitling them to belief. Petitioner had no confrontation nor opportunity to refute statements made and relied upon in said report. Exhibit "K" is a 6½ page refutation of Exhibit "B". Although it contains about four thousand words, it should have been admitted as Exhibit "B" was admitted.

These Exhibits "B" and "K", together, tend to show that the intent of Petitioner, who believed in the constitutional guarantee of justice, was only to receive redress of a wrong. Exhibit "7" (letter from Local Board to registrant construing proper classification 4-E), Exhibit "B" (Department of Justice report), Exhibit "C" (Telegram from petitioner to Local Board stating review request and requesting stay), and Exhibit "K" (request for review and refutation of Department of Justice report) all do this, and all are from the Selective Service file.

The general principle of law is as set forth in Volume 22 of Corpus Juris Secundum, page 84, *"Crime is not committed if the mind of the person doing the act is innocent", "Actus no facit reum, nisi mens sit rea".*

As to the evidence which is properly admissible to prove either the existence or absence of criminal intent the general principle of law is set forth in *Norcott v. The United States,* 65 F. (2d) 913, at page 918, as follows:

> "It is always proper for one charged with crime to prove any fact which throws light upon his intention, where the element is involved. * * *"
>
> "Under certain circumstances the question of the insufficiency of the evidence to justify the verdict may be reviewed where a palpable and obvious miscarriage of justice would otherwise result."

See,

Ng Sing v. United States, C. C. A. 9, 1925, 8 F. (2d) 919, at page 921.

Also,

Bilboa v. United States, C. C. A. 9, 1928, 287 Fed. 125, at page 126.

Quoting from *Williams v. United States,* 93 Fed. (2d) 685, at 687:

> "In reviewing this assignment, we are not unmindful that the able District Judge who tried this case has, heretofore, established a reputation for fairness and judicial poise, and in this opinion we do not wish to imply that the trial judge intentionally was unfair. But as the authorities herein referred to point out, the harm done is not diminished where the judge, by reason of unrestrained zeal, or through inadvertence, departs from 'that attitude of disinterestedness which is the foundation of a fair and impartial trial'."

Quoting from *Eagan v. The United States,* 287 Fed. 958, at page 971:

> "The trial judge should be so impartial, in the trial of a criminal case, that by no work or act of his may the jury be able to detect his personal convictions as to the guilt or innocence of the accused."

Adler v. U. S., 182 Fed. 464, at 472:

> "The impartiality of the judge—his avoidance of the appearance of becoming the advocate of either one side or the other of the pending controversy which is required by the conflict of the evidence to be finally submitted to the jury—is a fundamental and essential rule of especial importance in criminal cases. The importance and power of his office, and the theory and rule requiring impartial conduct on his part, make his slightest action of great weight with the jury."

Also the aforegoing and other authorities.

POINT V.

THE ARGUMENT TO A JURY BY AN ATTRACTIVE PROSECUTION COUNSEL WITH GOVERNMENTAL AUTHORITY IS DEEMED REVERSIBLE ERROR BECAUSE IT DECLARED UNTRUTHS AND WAS EMOTIONAL, PREJUDICIAL AND DETRIMENTAL.

Quoting from partial argument of prosecution counsel:

> "**Prosecution: * * * Do you believe, in view of his education, in view of the fact that he had read the regulations, in view of the fact he went down to the Board's office and read over the com-**

plete file, and in view of the conversation he had with the clerk wherein he was told he would have to report, it would be a violation of the law if he didn't report, that in order to stay induction there would have to be an order from the State Director; do you believe in view of the fact he didn't even care enough to call them and find out if they had a stay of induction -- that wire that was sent to him was not a proper stay of induction, it was merely a wire of statement of the Director -- do you believe, in view of the fact he wouldn't submit himself, after he found out he had no other recourse and repeatedly refused to go into the Army in a 1-A-O classification, after he had violated the law first, and before he had been inducted, that this man is in good faith?

Gentlemen, if you find, at the time this defendant attempted to appeal, that he knew the Board could not stay induction, that he must, nevertheless, report for induction or become delinquent under the law; that he did not receive a stay of induction himself, and he knew the Board had not received a stay of induction, and had made no effort to find out; in view of all this, and knowing all this, that this defendant still refused to obey the order of the Board; gentlemen, if you believe these facts, you must convict this defendant, for he is as guilty of violating the law as he could possibly be. Otherwise, as I have stated to you, every registrant in the country can stall off induction, can stay induction by going through this farce of appealing, such as the defendant tried to do here, and not reporting for induction.

Therefore, if he knew he should have reported, if he violated the law, and he knew he violated the law by not reporting - - he had control of his senses at the time he should have reported and he could have reported if he desired, if he didn't receive a stay of induction and the Board didn't receive a stay of induction - - you must convict the defendant of the offense with which he is charged.

I ask you gentlemen to bring in a verdict worthy of a man of this calibre who is willing to let your sons and brothers and friends go out and give their lives for a country which gives him the constitutional guarantee of a fair and full trial in which he can hide behind the defenses he has interposed on his own behalf.

Thank you."—(Emphases supplied.)
(Rep. Tr. Bk. 4, pp. 1-2.)

The attention of this Honorable Court is respectfully called to the following analysis of said argument:

> "Prosecution: * * * Do you believe, in view of his education, in view of the fact that he had read the regulations,"

The petitioner had not read the regulations and no one testified he had done so.

> "in view of the fact that he went down to the Board's office and read over the complete file,"

Petitioner was only following a Fellowship of Reconciliation leaflet which informed him he may do this. This leaflet was left in the evidence offered.

> "and in view of the conversation he had with the clerk wherein he was told he would have to report, it would be a violation of the law if he didn't report, that in order to stay induction there would have to be an order from the State Director;"

This prosecuting witness' testimony was ambiguous. The available evidence would prove she swore to a falsehood under oath either at the United States Commissioner's hearing or during this trial. Petitioner was not permitted to refute this, and now further ascertains the time of the only personal conversation with Exhibits "C" and "K" to have been before order was mailed because there was a reason for Exhibit "C", this reason is apparent on Exhibit "K", and the reason for Exhibit "K" had to come from Exhibit "B" to which it refers and which could only be seen at the Draft Board. The Draft Board Clerk testified there was only one personal conversation on the *2nd or 4th* when petitioner reviewed his file, and one telephone conversation *about the 19th.* The defendant testified *only one appearance when reviewing file,* and before sending Exhibit "C", also one telephone message on the 15th.

> "do you believe in view of the fact he didn't even care enough to call them and find out if they had a stay of induction,"

Petitioner deemed it unreasonable to ask an arbitrary clerk to corroborate her superior's promise after receiving Exhibits "A" and "N".

"- - that wire that was sent to him was not a proper stay of induction, it was merely a wire of statement of the Director - -"

Any ordinary person not knowing that a proper stay of induction must be issued on a proper form at that time would have reasonably relied and believed that Exhibits "J" and "A" constituted a temporary stay, not for a deferment, but for a proper induction to Work of National Importance without subsistence or pay, under the supervision of Selective Service, and with confinement and liberty the same as a soldier.

"do you believe, in view of the fact he wouldn't submit himself,"

Petitioner was sorry he didn't report on September 14th, but tried to prove his failure to report was without *any intent to disobey an induction order.* Exhibits "J" and "A" by themselves had caused petitioner honestly to feel the order was temporarily stayed; Selective Service Regulation 628.1 now shows this was legally possible. Petitioner's mistaken confidence in the authenticity of Exhibits "O" and "N" had caused him also to feel it was a prompted and invalid order, and he did not wish to argue nor accuse the Draft Board Clerk. Petitioner contends he had reason to dismiss the order from his mind which he unfortunately did, *but this was not an instance of* "WOULDN'T SUBMIT", only an instance of didn't report, without intent.

"after he found out he had no other recourse and repeatedly refused to go into the Army in a 1-A-O classification,"

The fact is there had been no offer nor induction order sent or received after September 14th. Petitioner testified the Draft Board Clerk arbitrarily refused to see or hear him the day following the date of induction. The Draft Board Clerk also has testified that defendant had answered the suspected delinquency notice within allowed time and was refused an appearance, an explanation, or advice, as evidenced on page 47, lines 18-26, and page 48, lines 1-13 of the Reporter's Transcript. (pp. 21-22 herein.)

This refusal of the Draft Board Clerk is a noncompliance with Selective Service Regulation 642.3, with which Regulation the Clerk testified she was familiar. (Rep. Tr. p. 166, lines 5-8.) This prompted indictment also constituted noncompliance of Selective Service Regulation 642.2 because this occurred the day following the date of induction. In the District Court Clerk's file is D. D. S. Form 279, requesting indictment, and dated September 14, 1942.

> "after he had violated the law first, and before he had been inducted, that this man is in good faith?"

Petitioner contended and contends he had only failed to report without any intent to disobey any valid order. Intent was not proved.

> "Gentlemen, if you find, at the time this defendant attempted to appeal, that he knew the Board could not stay induction, that he must, nevertheless, report for induction or become delinquent under the law;"

When an ordinary person is told that the National or State Director may stay an induction order; and when

in answer to "* * * will appreciate a stay pending review which I shall respect", the State Director of Selective Service answers, "* * * will give matter consideration and determine appropriate action", it is contended that a party to such a negotiation could not legally become a delinquent under the law before further word was received. Furthermore, in the light of 1942 Selective Service Regulation 642.3 counsel's above statement should be declared untrue.

> "that he did not receive a stay of induction himself,"

To any ordinary person, Exhibits "J" and "A", together, was a temporary stay.

> "and he knew the Board had not received a stay of induction,"

Petitioner contends this should be declared an untrue misleading statement. How did petitioner know? Who told him? What reason had he to deny the State Selective Service Director's agreement even if the consideration was only justice?

> "and made no effort to find out."

Why should a person doubt the State Selective Service Director? If any ordinary person had had reason to doubt him, would he ask a subordinate to verify his superior's promise, or ask it only from a greater authority?

> "in view of all this, and knowing all this, that this defendant still refused to obey the order of the Board;"

Petitioner is sorry he "missed the only boat", but there was no evidence he had refused to report. When a person fails to meet a train, he shouldn't be accused of *refusing* to meet the train. Exhibits "J" and "A" had told him he was not wanted on this train.

> "Gentlemen, if you believe these facts, you must convict this defendant, for he is as guilty of violating the law as he could possibly be."

The petitioner contends the preceding untrue statements of argument were not facts, but only authoritative misleading non-factual statements, and such statements offered as facts, accompanied with the positive declaration that a conviction must follow from them is not reasonable.

> "Otherwise, as I have stated to you, every registrant in the country can stall off induction."

This was not the first time during the whole of this argument that the jury was told in substance to: Convict-if-you-want-to-win-the war; *and if you do not convict this man, the whole Selective Service System will become ineffective.* This above part of argument should be declared untrue because just the opposite is true. An acquittal could have been followed immediately with an induction order, which would have inducted petitioner, and following registrants could not duplicate this case unless they also would receive the assurance this petitioner had received from prominent Selective Service authority.

> "can stay induction by going through this farce of appealing, such as the defendant tried to do here, and not reporting for induction."

It is contended that it is not a farce to wish redress for a wrong. This petitioner had been denied a fair hearing and only wished a reconsideration for a proper induction and not for a deferment; there is no farce in seeking that wrong shall not prevail when a man's rights have been invaded and violated.

> "Therefore, if he knew he should have reported, if he violated the law, and he knew he violated the law by not reporting - - he had control of his senses at the time he should have reported and he could have reported if he desired."

To be fair and honest, petitioner agreed he knew he should report *before* he had received the telegram from the State Director of Selective Service, *but contends he did not know he should report after he had received it* because Exhibit "J" and "A", together, were a stay to his mind. It was not proved he knew he should report after September 5th, when he had received said telegram, nor that he knew he was violating the law.

> "if he didn't receive a stay of induction and the Board didn't receive a stay of induction - - you must convict the defendant of the offense with which he is charged."

It is contended that Exhibits "J" and "A", together, were a stay of induction, and disprove any wilful intent if any meaning of intent is to remain effective on criminal indictments.

> "I ask you gentlemen to bring in a verdict worthy of a man of this calibre who is willing to let your sons and brothers and friends go out and

> give their lives for a country which gives him the constitutional guarantee of a fair and full trial in which he can hide behind the defenses he has interposed on his own behalf. Thank you."

Petitioner submits that the preceding emotionally appealing argument, distorted in fact in its presentment, made in a time of war by a comely young lady prosecutor with Governmental authority to a jury of 12 men prejudiced said jury into quickly convicting the defendant without sufficient evidence for conviction.

ADDITIONAL MATERIAL DEEMED WORTHY OF THE ATTENTION OF THIS HONORABLE COURT.

Petitioner contends that prosecuting counsel asked trick questions such as the following, with emphasis, and they were asked only to prejudice and mislead the jury because there could be no basis or truth to the question when the defendant had never met nor talked to the person mentioned in the question, Mr. Woods, and when petitioner only had heard of Mr. Woods.

> "Defense: Many of the questions are extremely argumentative; I am restraining myself in my objections.
>
> Q. By Prosecution: Mr. Pacman, between the date that you received your order to report for induction and the date that you received your order from Director Leitch, that he would not take any further action in your case, did you not tell Mr. Woods of the United States Employment Bureau, where you worked, that you thought you had beaten the Army, and you wouldn't have to go?

Defense: Objected to on the ground no proper foundation has been laid.

The Witness: No, I did not.

The Court: There is the answer."

(Rep. Tr. p. 205, lines 1-13.)

Attention is respectfully called to the veracity of the following, in the light of the 1942 Selective Service Regulation, Section 628.1 reproduced in Argument I of this petition.

"Prosecution. However, your Honor, I would like to bring your attention to the fact that under the law he has no right to request an appeal or presidential review.

The Court: That is right."

(Rep. Tr. p. 126, lines 10-13.)

"Prosecution: That does not allow the defendant or any registrant to give anything to the State Director of Selective Service regarding his classification. If the State Director of Selective Service decides, on his own, an injustice is being done, he may appeal on his own."

(Rep. Tr. p. 53, lines 8-12.)

"Prosecution: Your Honor, I object to the introduction of this evidence on the ground it is immaterial. It was sent after the order to report had been received, and after the order to report had been sent. It has nothing to do with the offense. After the order to report has been sent out by the local board there is nothing that can stay induction."

(Rep. Tr. p. 132, lines 18-24.)

Since petitioner's whole case showed he was attempting to receive a proper induction classification, and not a deferment, attention is respectfully called to the following untrue emphasized questions which may have prejudiced and misled the jury.

"Q. By Prosecution: You used that special form for conscientious objectors in order to get you out of the induction class?

Defense: Objected to as argumentative.

The Court: Put the question, why did you.

Prosecution: I will withdraw the question."

(Rep. Tr. p. 202, lines 7-12.)

"Q. As a matter of fact, you didn't care how you were classified as long as you were taken out of the induction class, isn't that true?

A. No."

(Rep. Tr. p. 203, lines 21-24.)

"Q. By Prosecution: Mr. Pacman, did you take this appeal in good faith?

Defense: What appeal?

Q. By Prosecution: This attempted appeal to the State Director, in good faith?

A. The best faith I have ever had in anything.

Q. By Prosecution: Isn't it true you took it to stall induction so you wouldn't have to go into the military service?

A. That is false."

(Rep. Tr. p. 212, lines 7-16.)

Petitioner contends that the following question was only asked to prejudice the jury toward a person born in a country with which the United States was at war; a foreign born person who could have changed his

name to hide something. However, the question was unnecessary because petitioner had furnished the prosecution with a copy of Exhibit "K" which fully explained this name, and the prosecution counsel knew all that petitioner could have answered.

"By Prosecution: Q. Mr. Pacman, have you ever been known by any other name than Mario Joseph Pacman?

A. Yes.

Q. What is that?

A. Maniccia, M-a-n-i-c-c-i-a.

Q. Mr. Pacman, you have stated you are unable to use force, therefore you have asked for a conscientious objector's classification, is that not correct?

A. Yes.

Q. You have also stated—

The Court: Just a moment. He had not finished. Did you have anything else to add?

The Witness: I really should say yes and no. I asked for a conscientious objector's classification when the Board construed my position to be that of a 4-E. I do feel that there are a hundred other things I could do.

The Court: Just listen to the question and answer it."

(Rep. Tr. p. 197, lines 13-26; p. 198, lines 1-4.)

In the case of *Viereck v. The United States,* 318 U. S. 236, 63 S. Ct. 561, 87 L. Ed. 734, the Supreme Court held a similar appeal could only have the purpose and effect of arousing passion and prejudice.

In commenting on the effect of said language, at page 248, the Court says:

"at a time when passion and prejudice are heightened by emotions, stirred by our participation in a great war, we do not doubt that these remarks addressed to the jury were highly prejudicial, and that they were offensive to the dignity and good order with which all proceedings in court should be conducted. *We think that the trial judge should have stopped counsel's discourse without waiting for an objection.* 'The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocent suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.' Berger v. United States, 295 U. S. 78, 88." (Italics supplied.)

What was said by the Supreme Court of the United States in *Ex parte Milligan,* 71 U. S. 2, 18 L. Ed. 281, has strong application to the present case. In that famous case, at page 118, the Court says:

"No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people; for it is the birth-

right of every American citizen when charged with crime, to be tried and punished according to law."

And at page 120, the Court says:

"The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shields of its protection all classes of men, at all times, and under all circumstances."

As was said by the Court in *Beck v. The United States,* 33 F. (2d) 107, at page 114:

"A trial in the United States court is a serious effort to ascertain the truth; atmosphere should not displace evidence; passion and prejudice are not aids in ascertaining the truth, and studied efforts to arouse them cannot be countenanced; the ascertainment of the truth, to the end that the law may be fearlessly enforced, without fear or favor, and that all men shall have a fair trial, is of greater value to society than a record for convictions."

In said case of *New York Central R. Co. v. Johnson,* 279 U. S. 310, at page 318, the Court, through Justice Stone, says:

"The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence. *The public interest requires that the Court of its own motion, as is its power and duty, protect suitors in their right to a verdict uninflu-*

enced by the appeals of counsel to passion or prejudice." (Emphasis supplied.)

As is said by the Court in *Ippolito v. The United States,* 108 F. (2d) 668, at page 671:

> "Sometimes a single misstep may be so destructive of a right of a defendant to a fair trial that reversal must follow. Pharr v. United States, 6 Cir. 48 F. (2d) 767."

In *Bagley v. The United States,* 136 Fed. (2d) 567, at page 570, the Court says:

> " 'At a time when passion and prejudice are heightened by emotions, stirred by our participation in a great war,' Viereck v. United States, 63 S. Ct. 561, 566, 87 L. Ed. ....., we must be particularly careful to hold to the foundations of our freedom."

Again in *United States v. Atkinson,* 297 U. S. 157, at page 160, the Court says:

> "In exceptional circumstances especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceeding. See New York Central R. Co. v. Johnson, 279 U. S. 310, 318; Brasfield v. United States, 272 U. S. 448, 450."

In *The United States v. Coffman,* 50 Fed. Supp. 823, at page 826, a decision by Judge Yankwich, the Court says:

"The rules of fair play in criminal detection and prosecution should be observed with greater strictness 'at a time when passion and prejudice are heightened by emotions, stirred by our participation in a great war'. Viereck v. United States, 1943, 318 U. S. 236, 248, 63 S. Ct. 561, 566, 87 L. Ed."

Quoting from *Pierce v. U. S.*, 86 Fed. (2d) 949, at page 953:

"that it was intended to prejudice the jury is sufficient ground for a conclusion that in fact it did so."

Plus other authorities quoted herein or known.

POINT VI.

THE CIRCUIT COURT ERRED IN NOT CONSIDERING THIRTY-FOUR ASSIGNMENTS OF ERRORS RAISED BY DEFENSE.

1. Said District Court erred in entering judgment against, and in pronouncing sentence upon, the appellant, in that the evidence was insufficient to support the verdict of guilty for the reason that no criminal intent was proven.

* * * * * * *

3. Said District Court erred in refusing to admit in evidence defendant's Exhibit "C", in that the same has a direct and material bearing on the existence of criminal intent.

4. Said District Court erred in refusing to admit in evidence defendant's Exhibit "D", in that the

same has a direct and material bearing on the existence of criminal intent.

5. Said District Court erred in sustaining the objections of the plaintiff to receiving Exhibit "F" in evidence, in that the same has a direct and material bearing on the existence of criminal intent.

6. Said District Court erred in sustaining the objections to the offer of defendant's Exhibit "G" in evidence, in that the same has a direct and material bearing on the existence of criminal intent.

7. Said District Court erred in sustaining the objection to the offer of defendant's Exhibit "K" in evidence, in that the same has a direct and material bearing on the existence of criminal intent.

8. Said District Court erred in sustaining the objections to the offer of defendant's Exhibit "L" in evidence, in that the same has a direct and material bearing on the existence of criminal intent.

9. Said District Court erred in sustaining the objections to the offer of defendant's Exhibits "N" and "O" in evidence, (offered together) in that the same has a direct and material bearing on the existence of criminal intent.

10. Said District Court erred in sustaining the objections to the introduction in evidence of defendant's Exhibit "P", in that same has a direct and material bearing on the existence of criminal intent. (This is defendant's own 3½ page defense plea. Promised, but yet unknown to the jury.)

11. Said District Court erred in granting plaintiff's motion to strike out defendant's answer when the defendant was asked what reason, if any, he had for not reporting on the 14th day of September, 1942, to-wit (page 190, lines 3-11 of Transcript): "I didn't report because I definitely felt that that particular induction order was being reviewed, or my classification was being reviewed and that I, the wire the Court won't permit, and the other is the wire from Colonel Leitch. I wouldn't have refused to obey this induction order. It didn't tell me I would have to kill. I still had an alternative if these people would not give me justice or consideration, I could go there." The answer was material and properly admissible on the issue of criminal intent.

12. Said District Court erred in making certain comments in the course of the trial which, while done without any intention of being unfair to the defendant, (counsel have too high a regard for the Judge who sat in this case to even dream of accusing him of intentional unfairness or bias in any case at any time), resulted in the failure of the defendant to have a fair trial, and which comments and conduct of the Court were prejudicial to the rights of the defendant, in that they show the impatience of the Court with defendant's case and must have had some influence on the jury and its verdict. Among said comments are the following:

(a) The defendant's counsel asked the defendant the following question (page 193, lines 15-19 of Transcript): "Did you, prior to the time of being prose-

cuted, make any attempt to get into any branch of the United States Army, under military supervision, where there would be danger to you, but would be such you would not have to kill?"

An objection to said question was sustained with the following comment by the Court, "I have listened enough to your arguments."

(b) Again when defendant's counsel inquired of the Court (page 196, lines 4-5 of Transcript): "Will your Honor permit me a short recess so that I may get my papers in order?", the Court responded, "I am trying to get through. I will have to ask you to proceed."

(c) Again on page 244 of the Transcript, lines 1-2, appears the following:

"The Court: 'I am gong to finish this case tonight. I have spent two whole days on it.' "

(d) Again, when counsel for defendant moved to reopen the case to ask the defendant several questions, in granting the motion, the Court said (page 259, lines 9-11 of Transcript):

"The Court: 'It is a matter entirely in the discretion of the court. I am three days on a case that should have taken one. I will permit it.' "

(e) Said conduct of the Court is in sharp contrast with the Court's attitude towards the Government's counsel. The record shows (page 261, lines 5-8 of Transcript) as follows:

"Miss Kluckhohn: 'Your Honor, the Government moves that the case be reopened and that I be permitted to question the defendant.'

"The Court: 'It is granted. Proceed!' "

13. Said District Court erred in sustaining an objection to the following question asked by defendant's counsel (page 193, lines 25-26 of Transcript): "Would you be willing now to accept service in the military service or signal corps where you would be assured you would not have to kill?", in that the same had a direct and material bearing on the existence of criminal intent.

14. Said District Court erred in that when the defendant testified that he would have gone on a food ship, although he knew it was dangerous to do so, adding (page 229, lines 5-6 of Transcript), "Who is talking about danger? I am talking about conscience," the Court ordered the same stricken on plaintiff's motion, in that said testimony had a direct and material bearing on the existence of criminal intent.

15. Said District Court erred in that the documents which had been marked for identification and offered in evidence, but which were not allowed to be introduced in evidence, being the documents referred to in paragraphs 2, 3, 4, 5, 6, 7, 8, 9 and 10 hereof, were properly admissible in support of defendant's claim that he was deprived of due process of law in that the hearing of his case by the Selective Training and Service Act Boards and Authorities was conducted in an arbitrary, unfair, capricious, unreasonable and

prejudicial manner, and in that the requirements of Section 5 (g) of the Selective Training and Service Act of 1940 and paragraph 375, Section XXVII, Volume Three of the Selective Service Regulations were not complied with.

16. Said District Court erred further in excluding testimony by the defendant concerning the nature of the hearing before the Hearing Officer of the Department of Justice, and also evidence tending to prove that in said hearing the defendant was not given the opportunity to show the falsity of the evidence offered against him or the chance to refute the same, since thereby he was denied and deprived of due process of law.

17. Said District Court erred in excluding the testimony of the defendant with respect to the hearing conducted by and evidence taken before the Local Draft Board, and the evidence of the defendant that said Board relied upon incorrect and even false information prejudicial to the defendant, the nature of which was not communicated to the defendant, and erred further in excluding testimony to show that the defendant was not afforded opportunity to reply to the same, said error consisting of this, namely, that said evidence was proper to be considered in determining the issue of the defendant's guilt particularly on the issue of criminal intent.

18. There is further error in the record of the District Court in the prejudicial remarks of the plaintiff's counsel, and particularly in the closing paragraphs

set forth in the Bill of Exceptions, especially the last sentence, as follows:

> "I ask you gentlemen to bring a verdict worthy of a man of this calibre who is willing to let your sons and brothers and friends go out and give their lives for a country which gives him the constitutional guarantee of a fair and full trial in which he can hide behind the defenses he has interposed on his own behalf."

With the country at war and some of the members of the jury probably having sons or brothers and certainly friends in the armed forces of our country and some of them probably on active fronts in distant lands, this language was intended and calculated to arouse the emotions, passions, prejudices, indignation and resentment of the members of the jury and undoubtedly did have this effect and was therefore prejudicial to the legal rights of the defendant since it resulted in his not having a fair trial and his being denied and deprived of due process of law.

19. Said District Court erred in refusing to give to the jury the following instruction, requested by the defendant:

"If you find that there was not substantial evidence before the boards to sustain the finding that defendant should be classified as he was, you will find the defendant not guilty.

"By substantial evidence is meant a large quantum of evidence. It does not mean an absence of evidence and it means more than just a scintilla or some evi-

dence. It means that there must be enough evidence before the boards so that a reasonable man in the same circumstances as presented in this case would come to the same conclusion as the boards did.

"If there was not enough of such evidence before the local or appeal board, you must acquit the defendant."

20. Said District Court erred in refusing to give to the jury the following instruction, requested by the defendant:

"The denial of a full and fair hearing is the same thing as the denial of any hearing. Therefore, if you find that although the defendant was granted a hearing, if that hearing was not a full and fair one but was merely perfunctory and not in accord with the ordinary rules of decency and fair play, or not in accord with the Rules and Regulations, you will find the defendant not guilty."

21. Said District Court erred in refusing to give to the jury the following instruction, requested by the defendant:

"Arbitrary power and the rule of the United States Constitution requiring the principle of fair play (legally known as "due process") cannot both exist at the same time. They are antagonistic and incompatible forces. Of necessity arbitrary power must perish before the rule of the Constitution. There is no place in our constitutional system of government (and this includes the administration of the Selective Service System) for the exercise of arbitrary power."

22. Said District Court erred in refusing to give to the jury the following instruction, requested by the defendant:

"You are instructed that although under the Act, the decision as to what classification a particular registrant is to receive is left to the local board, this does not mean that a court of law does not have the power nor that you as a jury do not have the power to review a classification.

"This review is limited, however, to a determination by the jury of the facts, subject to the limitations to be indicated by the Court in later instructions, that constitute arbitrariness or capriciousness, denial by the draft board of the provisions of the Selective Training and Service Act, or the Rules and Regulations adopted pursuant to that Act."

23. Said District Court erred in refusing to give to the jury the following instruction, requested by the defendant:

"If you find that the local or appeal board disregarded the evidence presented on behalf of the defendant, you will find the defendant not guilty."

24. Said District Court erred in refusing to give to the jury the following instruction, requested by the defendant:

"You are instructed that Local and Appeal Boards under the Selective Service System must not act in an arbitrary or capricious manner. Classifications by such boards must be based upon the evidence before them and that evidence alone.

"If you find that the local and appeal boards in this case acted in an arbitrary or capricious manner or disregarded the evidence that was before them or failed to give the registrant, defendant here, a full and fair hearing, you will acquit the defendant and find him not guilty."

25. Said District Court erred in refusing to give to the jury the following instruction, requested by the defendant:

"You are instructed that if a registrant has been advised by an agency of the Selective Training and Service System that his classification is being reviewed, and the registrant relies in good faith upon said representation, and in good faith believes that an order of a local draft board is stayed while said review is pending that any violation by said registrant, under the above circumstances, of any order of a local draft board is not committed knowingly.

"You are further instructed that if a registrant in good faith, because of reliance upon information which he in good faith believes, that an order of a local draft board has been stayed, and that he is under no legal requirement to comply with such order, violates said order, he does not do so knowingly."

26. Said District Court erred in refusing to give to the jury the following instruction, requested by the defendant:

"You are instructed that a registrant claiming classification as a conscientious objector under the Selective Training and Service Act is entitled to be

informed of evidence submitted against him, either to a local Draft Board, a hearing officer, or an appeals board in order that he may have an opportunity to meet such adverse evidence by submitting evidence in refutation thereof.

"You are further instructed that if evidence is submitted to a local draft board, to a hearing officer, or to a board of appeals in the Selective Training and Service System, which evidence is not submitted to the registrant and which evidence the registrant has no opportunity to answer, a classification or an order made by such agency or agencies of such Training and Service System violates due process of law and is unlawful.

Morgan v. United States, 298 U.S. 468
Morgan v. United States, 304 U.S. 1

"You are further instructed that a registrant is not required to obey an order of a local draft board if the order is unlawful.

Hopper v. United States, Ninth Circuit Court of Appeals, Dec. 18, 1942."

27. Said District Court erred in refusing to give to the jury the following instruction, requested by the defendant:

"You are instructed that, under the Rules and Regulations of the Selective Training and Service Act, a registrant is entitled to a IV-E classification, if he has been found by reason of religious training and belief to be conscientiously opposed to war in any form and to be conscientiously opposed to both com-

batant and non-combatant military service, and every such registrant shall be available for general service in work of national importance under civilian direction when found to be acceptable for such service.

Rules and Regulations, Selective Training and Service Act, 622.51

"You are instructed that the Selective Training and Service Act provides that no person shall be required to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form.

Selective Training and Service Act, Sec. 5:0."

28. Said District Court erred in refusing to give to the jury the following instruction, requested by the defendant:

"You are instructed that if a registrant has been advised by an agency of the Selective Training and Service System that his classification is being reviewed, and the registrant relies in good faith upon said representation and in good faith believes that an order of a local draft board is stayed while said review is pending that any violation by said registrant, under the above circumstances, of any order of a local draft board is not felonious.

"You are further instructed that if a registrant in good faith because of reliance upon information which he in good faith believes, that an order of a local draft board has been stayed, and that he is under no legal requirement to comply with such order, and said regis-

trant however violates said order, that said violation is not felonious."

29. Said District Court erred in refusing to give to the jury the following instruction, requested by the defendant:

"You are instructed that if a registrant has been advised by an agency of the Selective Training and Service System that his classification is being reviewed, and the registrant relies in good faith upon said representation, and in good faith believes that an order of a local draft board is stayed while said review is pending, that any violation by said registrant, under the above circumstances, of any order of a local draft board is not wilful.

"You are further instructed that if a registrant in good faith, because of reliance upon information which he in good faith believes, that an order of a local draft board has been stayed, and that he is under no legal requirement to comply with such order, and said registrant however violates said order, that said violation is not wilful."

30. Said District Court erred in refusing to give to the jury the following instruction, requested by the defendant:

"You are further instructed more particularly that if the order of the local or appeal boards in classifying the defendant was made arbitrarily or capriciously, or was the result of passion or prejudice; or was made in disregard of the evidence presented to it, or if there was not substantial evidence to sustain the finding of

the local board; or if the defendant was denied any hearing at all; or was denied a full and fair hearing, the order of the local or appeal board in ordering the defendant to report for induction into the armed forces was an illegal order since it was made as a result of the deprivation of the defendant of his right of due process of law.

"It is for the jury to determine the facts as to whether any of the above took place in the case of the defendant."

31. Said District Court erred in refusing to give to the jury the following instruction, requested by the defendant:

"You are instructed that the defendant is charged with having feloniously failed to report for induction into the armed forces of the United States. You must therefore find the defendant not guilty if you find that he did not feloniously fail to report for induction; or if you find that there is a reasonable doubt as to whether the defendant feloniously failed to report you will find the defendant not guilty."

32. Said District Court erred in giving and reading to the jury Government's instruction Number IV after modification by the Court, for the reason that the same even as modified did not conform to the law. The defendant excepted to the same. Said instruction reads as follows:

"You are instructed that the decision of the local board and the appeal board, with respect to the proper classification of the registrant, is final and conclusive.

It is not within your province to determine whether the defendant was getting a fair hearing before the Board, nor whether or not the Board erred in classifying him.

"What you are now to determine, beyond a reasonable doubt, and it is your exclusive province to determine, is whether or not the defendant after registering and receiving the order of the Board, knowingly failed to respond to the Board's order to report for induction. In determining this you may consider any matters other than those mentioned which might indicate to you the lack of intent on the part of the defendant to disregard the Board's order, such as, whether or not the notice to report was sent to the registrant and whether or not the registrant actually received or failed to receive it through no fault or neglect of his own, or in good faith believed the order of induction was suspended."

33. The District Court erred in giving and reading to the jury Government's instruction VI, as modified, for the reason that the same, even as modified, did not conform to the law. The defendant excepted to the same. Said instruction reads as follows:

"You are instructed that this defendant had no right under the Act or Selective Service Regulations to appeal to the President or to the State or National Director of Selective Service for the determination of the Board of Appeals and therefore no 10-day period for appeal or stay of execution existed and the local board was not required to wait any period between the time the defendant was notified of his classification

and the time the defendant was ordered to report for induction.

"You are further instructed that any order to report for induction issued by local board 228, after the defendant was notified of the appeal board's determination; that is, that he had been retained in classification 1-A-O, is effective and valid and must be obeyed by the registrant, unless the registrant, the defendant, in good faith believed the order of induction was suspended and therefore not effective."

35. The District Court erred in entering judgment upon the verdict and imposing sentence on the defendant because the record shows that the induction order was issued prior to the expiration of ten days after the defendant's classification, contrary to the provisions of the Selective Training and Service Act of 1940 and the amendments thereto. Mrs. Sniff, the chief clerk of the local board testified on direct examination (page 42, lines 15-18 of Transcript) as follows:

"Q. Now, was the defendant notified of the Appeal Board's action?

A. Yes, he was, on August 31st he was mailed a D.S.S. Form 58."

On September 3, 1942, a D.S.S. Form 150 to report for induction on September 14, 1942 was mailed to defendant. (Page 9, Bill of Exceptions.)

People v. Lynch, 140 Pac. (2d) 418;

People v. McDaniel, 140 Pac. (2d) 88;

Plus other authorities quoted herein.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing the said decision.

Dated, San Francisco, California,
October 25, 1944.

Respectfully submitted,
MARIO JOSEPH PACMAN,
Petitioner in Propria Persona.